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VIA ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Developing a Unified Inter-carrier Compensation Regime, CC Docket No. 01- 92;
Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket
No. 07-135; ***COMMENTS OF NORTH COUNTY COMMUNICATIONS
CORPORATION REGARDING PROPOSED RULES FOR FREE CALLING
COMPANY TRAFFIC***

Dear Secretary Dortch:

North County Communications Corporation ("NCC"), a competitive local exchange carrier ("CLEC") operating in more than a dozen states, by and through its undersigned counsel, hereby respectfully submits its comments to be filed in the above-noted dockets.

The Origin of the Evil

An "Aids Information Hotline" public service organization contacts a local telephone provider with a request for telephone service so that it can operate a non-profit AIDS hotline, free to the public. It proposes the following arrangement: For each dollar of terminating access charges the CLEC collects, the CLEC will share five cents with the hotline provider. This is how the hotline provider intends to fund its public service or offset their telephone costs. The CLEC agrees, and terminates all of the incoming calls at the prevailing RBOC rate as set forth in its tariff.

Verizon and other incumbent carriers want these kinds of arrangements declared unlawful, despite the following facts:

1. There is no additional charge imposed on the party making the call.
2. The originating caller's phone company gets paid by the calling party, just as it does in any other instance when the customer makes a non-800 phone call.



3. Verizon and other ILECs have, for decades, engaged in the identical conduct, paying commissions in exchange for the delivery of traffic to their networks.¹
4. Verizon and other ILECs have the same services on their network.

The real origin of the evil is not in the CLEC/provider arrangement concerning the termination fees, but on the originating end of the equation, when Verizon and other carriers agreed to provide the customer with unlimited long distance calling service to grab an even larger section of the highly competitive long distance telecommunications market and increase their profit margins by not paying termination charges. In effect, Verizon wants the CLECs to subsidize its provision of long distance service to its customers by not having to pay terminating access charges for the calls their customers make to information-based providers of telecommunications services. To make matters even worse, when Verizon is the tandem provider, not only does it charge its tandem switching fee, Verizon also charges CLECs for the circuits to deliver this traffic from their tandem. For a plethora of reasons, some of which are set forth below, the FCC must not be misled into believing that any harm comes from a sharing of rightfully earned termination fees.²

Specifically, with respect to Verizon's *ex parte* letter dated June 28, 2010, we offer input on the following: First, Verizon's misguided contention that the FCC's order will have an immediate and devastating effect on commercial negotiations between CLECs and CMRS providers; Second, Verizon's unsupported contention that the FCC's lack of action has produced, "new traffic pumping schemes"; Third, Verizon's baseless contention that chat line traffic is comparable to ISP traffic; Fourth, Verizon's hypocritical contention that paying commissions is inappropriate; Fifth, that a service is only legitimate if the information provider or conference provider charges for the service in the same manner as Verizon (and doesn't offer the service for free or have it be advertiser supported)³; Sixth, Verizon would benefit tremendously by forcing free calling companies to use its 900 product -- a product that is not available from cell phones, payphones, or hotels, and that costs 20 times as much as dialing a regular telephone number to obtain the exact same service and content.

Background and Benefits of the Traffic in Question

When Congress adopted the 1996 Telecom Act, the objective was to create a level playing field between CLECs and ILECs. How is that objective furthered by allowing ILECs to file tariffs covering compensation for CMRS traffic, but not allowing CLECs the identical right?

¹ See Exhibit 1, attached, Verizon's Direct Termination Commission Contract.

² Fact Report: The Economic Impact of Free Conference Calling Services, Exhibit 2, at pp. 28-30.

³ Many Conference providers offer their services for free to the consumer and make money on advertising and up-selling. This is similar to the Google, Yahoo, or Microsoft business model of offering search results or e-mail for free because they all generate revenue by displaying ads on their pages.



The FCC's T-Mobile Order did just that, providing the ILECs yet another overwhelming market/competitive advantage which the CMRS providers continue to exploit with complete impunity by refusing to pay for traffic originating on their network and directed at the CLECs' switches, which the CLECs have no choice but to terminate. If a CMRS carrier does not agree with an ILEC's tariff rate, the CMRS carrier can simply dispute the rate with the State Commissions.

What possible rational or reason would compel the FCC to treat a CLEC any different? The Commission's order is allowing State Commissions to set the rates for CLECs, just as they do for ILECs. Verizon would have you believe, without any basis in reason, that the state commissions were capable of approving tariffs with reasonable rates for the ILECs but are going to set artificially high rates for the CLECs. Verizon Wireless and several other wireless carriers have used strong-arm tactics and self-help remedies by refusing to pay anything for CMRS traffic termination for over five years, paralyzing the CLECs while they continue to enjoy their profiteering, free from those pesky termination charges! The FCC order is not going to have an "immediate and devastating" effect on CMRS providers; it is simply going to set the appropriate rates that CMRS providers should pay for the traffic they are encouraging their customers to originate and for which they generate a profit. It will, however, have the effect of putting out of business scores of competitive carriers who simply cannot survive the self help remedy of non-payment and the overwhelming costs to defend against the onslaught of litigation instituted by the telecom behemoths.

Verizon would also have you believe that conference call traffic (coined "chat line traffic" in an attempt to degrade its status) -- traffic originating on its own network-- is something new. Chat lines, dial-a-joke, weather, time, sports scores, lottery results, horoscopes, psychic lines, and voice personals have been commercially available on POTS lines and cell phone lines well before CLECs ever existed. These services are simply another form of social networking. Are Facebook, Myspace, YouTube, Amazon, or Google internet traffic pumpers because a lot people go to their web pages? Are they doing something unethical because they sell advertisements on their web pages or pay commissions to companies that direct traffic there? Clearly the answer is no. There is no justification to treat telecom traffic any differently.

Verizon's clients are Individuals who want to go to those web pages and/or call those numbers. They are not artificially created calls. This is no different than these customers calling their friends. There is nothing unethical about this traffic whatsoever.⁴ Verizon and other providers have successfully grabbed large sections of market share by offering "all you can eat"

⁴ The fact is this traffic was found to "... fulfill, not retard, the FCC's underlying public policy goal of providing advanced services to rural America, while simultaneously stimulating competition and creating employment opportunities". See, Fact Report: The Economic Impact of Free Conference Calling Services, Exhibit 2, at p. 4.



phone service in the hopes that their customers don't spend too much time on the phone, and when they end up spending a few hours on conference calls engaging in First Amendment protected speech⁵, Verizon is the first to cry foul.

While we are all sure that internet service providers would love for people to sign up for unlimited internet and rarely use it, the fact is that people love their on-line time as much as they love their telephone social networking time. If these wireless carriers or long distance providers are concerned about customers using their telephones too much, they shouldn't blame the people or companies their customers call. If this is truly a problem (and we suspect it isn't⁶)⁷ Verizon and other ILECs/IXCs/CMRS providers should simply modify their calling plans and put reasonable caps on their unlimited plans, *not* raise their rates, refuse to pay termination fees or have unjustifiable unlimited calling plans. To blame the CLECs, who are legally obligated to terminate the calls, or the chat-line providers, who bring these callers together, is scape-goating, pure and simple. You don't hear any news about Verizon refusing to provide local phone service to chat line providers, colleges, call centers, large businesses, lottery result lines or any other type of customer that receives a lot of incoming calls. When Verizon profits from the traffic, it is not a problem. When a competitor does, watch out.

The Anti-Competitive Attack

The FCC should also note that Verizon and many other carriers have significantly raised their per minute rates for end users who do not sign up for one of their plans. Their goal is to have everyone on a plan, *while at the same time* prevent consumers from fully enjoying the benefits of the plans they were sold. Rates in excess of a dollar a minute to make an interstate call have been imposed when one is not on a plan, in order to effectuate the migration to the plans. After a successful marketing blitz, a large number of subscribers signed up for these

⁵ See below section entitled "Verizon's Proposed Rules Will Result in an Unconstitutional Restraint on Free Speech."

⁶ The fact is the ILECs, IXCs and the CMRS providers are fully compensated for their traffic and benefit from the larger call volumes. See, Fact Report: The Economic Impact of Free Conference Calling Services, Exhibit 2, at p. 21, attached. According to that report and the FCC data cited therein, "...IXCs are earning between 4¢ and 6½¢ per minute on every call made to a free conferencing service, or 24¢ per minute in the case of the customer in Exhibit B. Even at 3¢ per minute for access charges, which is at the high end, and accepting the lowest possible estimate for profit, the IXCs are making 4¢ per minute on conference traffic, which is an extremely generous profit on these calls.... One theme becomes clear. The claims about "losing money" on calls made to free conferences are bogus. Of course the IXCs would prefer lower access charges, but then they would like lower taxes and lower labor costs as well. In short, this "losing money" argument is merely another way for these powerful economic interests, the IXCs, to get a larger share of the market."

⁷ Moreover, the evidence is in that instead of increasing, voice traffic is actually *declining*. See Exhibit 3, Washington Post article dated August 8, 2010, attached.



plans, and Verizon now wants to blame chat line providers for the increased use of their network. This would be no different than a restaurant offering an all you can eat buffet and then complaining to the supplier that the food is too good and people are eating too much of it for them to make money under their current pricing structure. Clearly, Verizon's customers want to call these services. These calls are not artificially created calls. Verizon is reaping the benefits by charging its customers to transport these calls but is unlawfully refusing to compensate the CLEC for terminating them.

Even more troubling is the hypocrisy demonstrated by the fact that the ILECs ran their own chat lines in the past and continue to sell services to chat line providers, but complain when a CLEC has a chat line on its network.⁸ Why is it inappropriate for a CLEC to profit from providing services to chat-line providers, but appropriate for the ILECs to run their own services and continue to sell service to chat line providers for a profit? We attach an article from US News and World report for December 1985⁹ that specifically mentions USWest/Qwest running chat line services. I am also attaching a brochure from Pacific Bell/AT&T describing the "Pacific Bell Talkline."¹⁰ It describes its service as a:

[U]nique 24 hour-a-day 'public teleconferencing service' which allows 2 to 20 participants to engage in a casual, anonymous conversation. Currently available in trial areas in Northern and Southern California, there are separate telephone numbers for seniors, adults, and teens.

The ILECs continue to offer time/weather information and teleconferencing over regular telephone lines and talking yellow pages. We attach a Verizon brochure describing their business teleconferencing services and related press release.¹¹ In addition, we attach copies of their talking yellow pages. All of these services manifestly and by definition increase call volume. If the FCC were to believe Verizon, these would all be examples of artificially created "call pumping." Verizon is attempting to say that because it charges the consumers and/or end users more money, that somehow the traffic generated as a consequence of advertising and offering these services, is not "artificially stimulated". Conversely, Verizon argues that because its competitors offer the identical service at a lower price, the service is now called "traffic pumping." This is a blatant attempt by Verizon to set the pricing for these services at artificially high levels to the detriment of the consuming public.

⁸ See Exhibit 4, attached, the "Gay Connection" and "Sweet Sensation" ads for chat-lines on Verizon's network.

⁹ See Exhibit 5, attached, the US News and World Report dated December, 1985 and PRNewswire Press Release dated March 18, 1997.

¹⁰ See Exhibit 6, attached, PacBell/AT&T Brochure for "Pacific Bell Talkline."

¹¹ See Exhibit 7, Verizon Business Teleconferencing Service Advertisement, attached.



Moreover, ILEC's and long distance carriers such as Verizon provide phone lines to chat-line providers. They sell chat-line providers services using regular ten digit telephone lines, 900 numbers, 976 numbers and even special overseas numbers.¹² Not only do they charge access fees or reciprocal compensation fees to other carriers, they also pay commissions to the chat-line providers on the calls when a premium charge is rendered. Verizon even created special numbers/"adult prefixes" for "adult entertainment." Verizon describes "adult" programming as that which "explicitly or implicitly offers or is intended to offer sexual stimulation or arousal."¹³ Verizon charges other carriers whenever one of those other carriers' end users dials one of these numbers. What is interesting is the fact that Verizon pays commission/royalties of up to 90%¹⁴ to other chat line providers who supply Verizon with an abundance of highly profitable chat line telecommunications traffic, while claiming CLEC chat line traffic is not compensable because it constitutes "artificial call pumping." Moreover, since wireless carriers can't charge access fees, many if not all the larger ILECs have revenue sharing agreements with wireless carriers to direct toll free traffic to their switches so they can charge other carriers originating access fees.

In addition to the attached contracts, ILEC and Long Distance carriers such as Verizon have engaged in what they are now conveniently calling "traffic pumping" and revenue sharing in other areas – SMS voting, call-in votes to Dancing With the Stars, etc.; highly discounted plans to hotels, airports, etc.; exclusive deal with iPhone and have paid commissions to inside and outside sales people for signing up customers who generate a lot of calls. In fact, when Windstream announced it would acquire Iowa Telephone, it announced at the same time that its first order of business is to substantially expand Iowa Tel's call center operations. Is this traffic pumping? Verizon wants to call this "arbitrage," but it is expressly permitted by the FCC's rules. The FCC has had an open rulemaking on this since mid-2007. If it wants to change the rules it can, but there are no grounds to support the illegal self-help behavior, which the FCC has repeatedly found to violate the Communications Act.

Most ILECs have revenue sharing agreements with prisons, hotels, large businesses, universities, airports and even pay phone providers who count on a large number of incoming calls.¹⁵ If a carrier chooses to pay commissions, this should be of no concern to the FCC, as long as there is no increased charge to the consumer. The FCC has repeatedly found that revenue sharing or paying commissions is not unlawful and actually serves the public interest. See, e.g., *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd. 16130, FCC 01-243 (rel. August 31, 2001). The Iowa Utilities Board found that commission payments and revenue sharing are not unreasonable practices. See *Qwest Communications Corp. v. Superior Tel.*, et al., Final Order, Docket No.

¹² See Exhibit 8, Verizon Information Packets for its 900/976 and 550 services and Verizon's Overseas Audiotext Service, attached.

¹³ See Exhibit 9, Verizon 900 Newsletter, attached.

¹⁴ See exhibit 10. Verizon's 900 contract, attached hereto.

¹⁵ See Exhibit 11, articles describing Verizon's commission and revenue sharing arrangements.



FCU-07-2 (issued Sept. 21, 2009). Commissions or revenue sharing agreements do not create artificial traffic, but merely compensate those engaged in the provision of a wide variety of telecommunications services attractive to so many callers. There is nothing illegitimate for a carrier to choose to make less money by paying commissions or offering a service at a lower cost than a multi-billion dollar company. Isn't this the way the free market system is supposed to work?

Verizon would have you believe the chat-line traffic is comparable to ISP dial up traffic and therefore the rate should be lower than other voice traffic. This can't be farther from the truth. Users of dial up internet would stay online for days, weeks and even months at a time. They wanted to receive their emails instantly so they would never have to hang up. These long hold times were the justification for a special \$0.0007 rate. This is simply not the case with chat-lines, whose callers have ordinary hold times. Moreover, the FCC has, on many occasions, stated that "a minute is a minute" for voice traffic. Callers are on the phones talking, just as they might do when making calls to family or friends. If Verizon had its way, there would be a special \$0.0007 rate for terminating traffic originating from all thirteen year old girls because of their reputation for spending so much time on the phone!

Verizon is reaping the benefits by charging its customers to transport these calls but refusing to compensate the CLECs for terminating the calls, which the CLECs are legally obligated to do. Passing rules prohibiting or discouraging CLECs from signing up these types of customers would be no different than prohibiting CLECs from selling telephone service to teenagers because they talk on the phone a lot more than the rest of us. Verizon and other LECs and IXC's have, for decades, contracted with hotels, universities, large corporations, call centers, lottery results lines, newspapers and other large incoming call volume business to provide local phone service. These are the identical services that the CLECs are providing to their conference call customers. Verizon wants to preserve this type of high volume incoming call business for itself and remove any financial incentive for CLECs to service those types of customers by refusing to pay access fees and reciprocal compensation to the CLECs for that traffic and by proposing rules before this Commission to prevent the CLECs from competing in this area. In so doing, Verizon's proposals are nothing short of an attempt to "turn back the clock" on the Telecommunications Act's purpose and intent to create a more competitive marketplace. By increasing CLEC's expenses in having to defend their legitimate provision of telecommunications services, Verizon and other ILECs and IXC's are dipping into their vast war-chests in an effort to make it impossible for the CLECs to invest in plant, equipment, advertising and other more profitable ventures.

Take, for example, Verizon's conduct in purposefully delaying NCC's entry into the Illinois telecommunications market. In October 2004, the Illinois Commerce Commission held that Verizon had engaged in anti-competitive, bad faith behavior in order to keep NCC, a



competitor, from offering service to customers in the Illinois market.¹⁶ It is clear that Verizon will stop at nothing to protect what it believes to be its exclusive right to provision these services to end users.

And it doesn't stop there. In West Virginia, Verizon delayed NCC's legitimate attempts to provision these telecommunications services to customers that Verizon believed it has an exclusive right to serve in that market. As the testimony from the West Virginia proceeding makes clear, Verizon, under the auspices of an "investigation into NCC's practices" refused to interconnect with NCC in West Virginia, claiming that NCC had intended to service ISPs engaging in the "chat line" business. Staff at the West Virginia Public Service Commission commented, on the record, that Verizon and others were engaging in the identical course of conduct, and that it was perfectly legal, noting that no carrier had the right to control the content of a caller's conduct. The point was, and is, that Verizon went to great lengths to manufacture a pretext for delaying, and attempting to prevent, NCC's attempt to compete in the business of servicing high volume incoming call customers in the West Virginia telecommunications market.¹⁷

The Abuse of the FCC'S Farmers & Merchants Ruling

A major new and powerful tool in Verizon's anti-competition arsenal is the abuse of the FCC's recent rulings in the Farmers & Merchants case dated November 24, 2009, and March 17, 2010. There, the FCC rightfully came down hard on a Rate-of-Return Rural ILEC which, instead of using NECA's tariffed rate, went its own way, filing a cost study based on dubious assumptions to support its over-stated tariff rate. The result was the imposition by Farmers of an unreasonably high rate of its access fees on unsuspecting IXCs. The FCC found that the high access fees were based upon the extremely understated traffic volume assumptions set forth in Farmers' cost study which did not reflect what Farmers knew and which it withheld from regulators when it filed its tariffs. That is, Farmers intended to purposefully understate traffic volumes for the study, and "pump up" the traffic with advertising, marketing and direct support of its specially treated "end users". In the context of the regulatory fraud perpetuated by an ILEC seeking to take advantage of the "NECA opt-out" provisions and which was therefore bound by law to only provide its services per its approved tariff, the FCC allowed otherwise unnecessary discovery into the relationship between Farmers and its "end users."

The FCC needs to be aware that Verizon is using the limited holding in Farmers and Merchants to engage in overly intrusive discovery into the relationships between CLECS and

¹⁶ See Exhibit 12, the decision of the Illinois Commerce Commission, Case No. 02-0147, dated October 6, 2004, attached.

¹⁷ See Exhibit 13, the excerpts from the West Virginia Public Service Commission proceedings in Case No. 02-0254-T-C.



their customers in every challenge to the imposition of access fees, including propounding hundreds of pages of discovery requests to NCC and noticing harassing depositions of NCC's customer based in NCC's current dispute with Verizon regarding access fees. This is true even in cases where there is none of the indicia of rate-of-return fraud because the CLEC was matching the access fees of Verizon, AT&T and Qwest. Certainly, there can be no better indication of a lack of fraud or over-billing where the CLEC's rates were "just and reasonable" as evidenced by the matching rate.¹⁸ Resorting to investigations which include the intrusive analysis of legally protected CPNI data of each CLEC's customers, Verizon claims a right to delve into the CLEC's customer base, customer relationships, financial documents and other highly valuable competitive business model information, all in the name of a challenge to the imposition of access fees for traffic that Verizon knows was delivered and for which Verizon collected long distance fees from its customers.

Verizon's harassment has gone so far as to include demanding customer lists, calling and taking depositions of CLECs' customers, unjustifiably and possibly illegally looking at CPNI data if the CLEC's customer also had circuits with them, and hiring private investigators to talk to the ex-girl of NCC's president. Verizon has sought detailed information regarding census information regarding NCC's customer base, including the percentages of its customers providing chat line services and those who do not, both currently and historically and financial statements of both the CLEC and its customers. Verizon has sought to depose every employee, contractor, analyst, business partner and associate who has ever been associated with NCC, going back over ten years, and has sought discovery of every one of its possible domain names and other protected trade secret information. Clearly this was not the intent of the FCC's decision in *Farmers*, where the FCC simply wanted to prevent the ILEC from engaging in rate of return fraud by charging inflated rates for this traffic.

The FCC needs to immediately clarify its ruling to limit such overbroad discovery into the CLEC/customer relationship to cases involving overt rate of return fraud lest every CLEC be bullied into submission by the vindictive intrusion of the all powerful and well funded IXCs. Certain IXC's like Verizon, are successfully and overwhelmingly increasing CLEC's costs by making them spend hundreds of thousands of dollars in attorney fees, and are harassing the CLEC's and their customers whenever the CLECS attempt to collect access fees for terminating this traffic.

If the FCC is concerned about high rural rates in Iowa, then they should go after carriers who are abusing rate of return regulations and/or lower the rates in rural areas. There is no justification for attempting to control the content of telephone calls by financial regulations. This is treading a thin Constitutional line. An innovative solution is for the FCC to only approve

¹⁸ That matching rate is reasonable whether or not the end user obtained the services from the CLEC via tariff, contract or otherwise.



tariffs with a step down rates as it did in the Tekstar tariffs.¹⁹ Verizon and some wireless carriers are even trying to squelch free speech in low access areas such as California and Qwest territories that have access fees that are a fraction of a penny.

Verizon Cannot Establish a Valid Need for the Proposed Regulations

A practice which the Commission seeks to regulate must be: prevalent; one that causes or is likely to cause a substantial injury; one which consumers cannot reasonably avoid themselves; and, one which is not outweighed by countervailing benefits to consumers or competitors. [15 U.S.C. §§ 45 (a, n), 57a (b)(3)].

Without so much as a single citation to evidence supporting its position as to a single one of the elements required by the above referenced statutes, Verizon asks this Commission to step into the mix with the passage of rules, regulations or decisions cleverly and curiously designed to advance its own self interests over the smaller and less powerful CLECs. The above referenced code sections were specifically designed to prevent precipitous action by any regulatory body to regulate an alleged “practice” for precisely the reasons applicable here; that is, to keep special interests from attempting to manipulate the regulatory process for their benefit. Verizon must not be permitted, without substantial evidence to satisfy the requirements set forth above, to coerce this Commission into the unwarranted regulation of the nature of traffic and how that affects access fees and reciprocal compensation.

Verizon’s Proposed Rules Will Result in an Unconstitutional Restraint on Free Speech

A De Facto Content-Based Restriction

Treating chat line traffic in a separate category or regulating the payment of commissions is an impermissible violation of First Amendment Rights insofar as it is, in actuality, an attempt to improperly regulate content. Unable to have equal access to the much cheaper transmission services, if Verizon’s proposals are accepted, the content will effectively be regulated out of existence. Supporters of these proposed changes want to discourage the use of telephones. By limiting the ability of a CLEC to collect payment for the service provided is an effective way to regulate and in fact eliminate the transporting of content some deem undesirable. As the FCC well knows, the First Amendment “. . . does not countenance governmental control over the content of messages expressed by private individuals.” Turner Broadcasting Systems v. FCC, 114 Supreme Ct. 2445 (1994).

“Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.” Reno v. A.C.L.U., 117 S.Ct.

¹⁹ See Exhibit 14, the relevant portions of Tekstar’s tariffs, attached.



2329, 2344 (1997). “Indeed, the First Amendment was designed to prevent the majority, through Acts of Congress, from silencing those who would express unpopular or unconventional views.” A.C.L.U. v. Reno, ____ U.S. ____ (1999); No. 98-5591. By way of the requests for regulation/action contained in Verizon’s letter of ____, Verizon seeks to protect its market share and dominance. The Commission must not allow itself to be Verizon’s tool or to assist Verizon in its quest to silence the voice of the town crier in Americans most in need of an open, convenient, and affordable forum for the free, unfettered expression of divergent views. After all, many of the country’s domestic and international chat and information services include numerous conference chat-lines devoted to providing a voice to segments of society which go largely without an opportunity to be heard. These providers offer a safe environment for people from diverse groups to share common interests and to exercise their constitutional rights to freedom of association and speech. These providers create a forum for the free flow of information to segments of society which may, if not encouraged, go without needed information.

By attacking chat-line telecommunications traffic, Verizon has decided that certain messages are “good and pure,” deserving of unfettered public access, while other constitutionally-protected messages are “bad and evil,” and thus to be discouraged and unduly burdened with unnecessary regulatory preambles and other hindrances established by the 900-number arena. Make no mistake, as discussed below, the proposed rule, in effect, eliminates the entire domestic and international (“one plus” and 011 dialing patterns) long distance forums as a meeting place for the free flow of ideas between individuals with common interests unless those participants agree to give up substantial privacy rights. Of course, this action is unconstitutional.

An Unconstitutional Financial Disincentive to Free Speech

Regulations which permit the government to discriminate on the basis of the content of the message will not be tolerated under the First Amendment. Regan v. Time, Inc., 468 U.S. 641, 650 (1984). A statute which has the effect of deterring speech, even if not totally suppressing speech, is a restraint on free expression. A.C.L.U. v. Reno, *supra*, citing Fabulous Associates, Inc. v. Pennsylvania P.U.C., 896 F.2d 780, 785 (3d Cir. 1990). By permitting Verizon, other ILECs, IXC, and CMRS providers to avoid having to pay termination fees when their customers call chat line and information providers, both the provider and the CLEC, who is obligated to terminate the calls, is placed at a distinct financial disadvantage. The net result is that the CLEC and the chat-line provider are being punished based upon the content of the telecommunications traffic being delivered. If the Commission allows this two-tiered approach toward the compensation of carriers for terminating telecommunications traffic – one tier for traffic Verizon and the other ILECs deem “appropriate”, and another tier for traffic Verizon and the ILECs deem “inappropriate”, the Commission commits an act no different in principle than if it had attempted to require Republican political commentators to pay a registration fee before



appearing on television while exempting Democratic political consultants from having to pay the registration fee. E.g., Simon & Shuster v. Crime Victim's Board, 502 U.S. 105 (1991) (financial burdens operating as a disincentive to speech impermissible). Neither Verizon nor this Commission has any basis, in law or fact, to differentiate termination fees based upon the content, motive or relative values expressed in the telecommunications traffic being terminated.

The First Amendment plainly prohibits the Commission from favoring one type of telecommunications traffic (chat-line or information provider) over another (business conference call) based upon the content of the message or the motive of the parties participating in the call. The proposal to either prohibit or otherwise limit CLECs from collecting termination charges for calls to chat-line or other information providers will discourage many such providers from providing to the calling public the richly divergent sources of communicating with their peers which the calling public has come to rely upon. Nothing good can come from limiting consumers from gaining access to this vibrant and limitless source of information. Reno v. A.C.L.U., 117 S.Ct. 2329, 2337 (1997). “[G]overnment regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.” Id. at 2351. The proposed regulation will undeniably and prohibitively place an unlawful disincentive and disadvantage on the CLECs, chat-line and other information providers, resulting on a chilling of the free expression of views, ideas and values contrary to those who seek to impose the limitations. Hence, the proposed regulations will discourage and hinder individuals’ and society’s right to receive information of public interest necessary to the sustenance of an intelligent, well-informed populace. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

The Motive

One need only look back to 1989 to uncover the genesis of the not so thinly-veiled agenda. In Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1999), the Supreme Court overruled attempts by the FTC and the FCC to unconstitutionally control the free-flow of information by restricting adults from engaging in “indecent”, as well as obscene communications over telephone lines. The FTC’s and FCC’s attempt to outright ban indecent telephone messages violated the First Amendment, despite the government’s attempt to sell the Supreme Court the idea that it had a compelling interest to do so; that is, to protect minors from exposure to indecency. Since that time, both the FTC and the FCC, acknowledging that any future attempt to explicitly control the content of telephone communications would be struck down as unconstitutional, have attacked the same communications obliquely by imposing regulations and rules on an industry which has created a forum for the expression of views which some feel are inappropriate. Verizon’s proposal to limit or prohibit CLECs from collecting termination fees for the termination of chat-line traffic is just the latest attempt to convince the FCC to carry out the goal of “. . . silencing those who would express unpopular or



unconventional views.” A.C.L.U. v. Reno, *supra*. The FCC should acknowledge the inappropriateness of pursuing a course of conduct which operates in essence to squelch the free-flow of information that certain segments of society simply consider meritless. Freedom of the press should not be limited only to those who own one. (A.C.L.U. v. Reno) Imposing the type of financial burdens that will necessarily result as a consequence of the proposed limitation on termination fees does just that.

Even if the statutory and regulatory scheme could be viewed as content-neutral,²⁰ which they cannot, it is readily apparent that there is no genuine motive to protect the consumers or the telecommunications marketplace. Considering that the callers utilizing the chat-line opportunities available to them do so by choice, at rates identical to any other call, these callers do not need Big Brother Verizon’s protections. Every caller knows and understands the local or long distance charges applicable to the calls they are making. Verizon and the other ILECs know what they are doing when they offer calling plans that allow unlimited calling. Banning or limiting compensation for the termination of calls to chat-line providers is simply unacceptable under circumstances where the consumers are in control of their own calling option plans and exposure to charges.²¹ Unjustified and unduly burdensome limitations/restrictions on compensation based upon the character of the call will always chill protected free speech. How could it possibly be then argued that limitations on compensation for terminating chat-line traffic are justified? Under the circumstances, the proposed regulations/limitations could never meet

²⁰ Not that content matters, especially from a First Amendment point of view, but it would be a mistake to assume that all chat line traffic is “adult”. Some of the biggest users of free conference calling traffic are political parties, religious groups, the US military, support groups, and others who do not want to be squelched from expressing their constitutionally protected views. Verizon’s primary complaint is that the callers are getting to express themselves for “free” and appear to have no qualm if a premium charged is imposed for the identical call. There is no constitutional justification for the position that you may engage in “free speech” only if you pay for the privilege of doing so. In fact, it’s antithetical to the entire notion of free speech.

²¹ There are virtually no consumer complaints about domestic long distance or local audio-text calls. At the FTC Pay-Per-Call workshop in May 1999, when the representative of the Association of Attorneys General was asked if such calls were a problem, she responded that she was not familiar with any consumer complaints regarding them. Nowhere do the comments of the National Association of Attorneys General mention that 1+ calls (i.e., calls to other area codes) are a problem for consumers. Similarly supporting these Commenter’s’ position, the comments of U.S. West cite no complaints regarding 1+ dialing. (The only complaints are from carriers that are attempting to maximize their profits by taking away one way that CLEC’s have been able to compete with the large incumbent carriers.) In fact, US West (QWEST) had no trouble with this traffic when it was the only game in town profiting therefrom. It was only after other, smaller competitors got into the game that QWEST began to complain.



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the prong of 15 U.S.C. 45(n) which prohibits action by where the injury is "... reasonably avoidable by the consumers themselves."

The Commission cannot justify the proposed change and the ensuing impact it will have upon consumers' free speech and free association rights. The marketplace of ideas which have defined the rich history of American thought takes a back seat to no tribunal, let alone this Commission and its allegiances.

Conclusion

By all credible accounts, the play by Verizon to convince the FCC to promulgate rules affecting a CLEC's rights to collect fees for calls it must terminate, originating from Verizon's own callers, for which Verizon received payment, and which the CLEC billed at the same rate that Verizon charges for the identical service, is nothing more than a power-grab. Verizon and its co-ILECs and IXC's have power enough and the FCC shouldn't be hoodwinked into believing their baseless claims that the CLECs are somehow taking advantage of them. The evidence is quite clear that exactly the opposite is true. Without the FCC's immediate intervention, the CLECs are doomed to failure, along with the competition that has always been the FCC's goal.

Very truly yours,

DICKS & WORKMAN, APC



Joseph G. Dicks

JGD/jh

TABLE OF ATTACHMENTS

- Exhibit 1 – Verizon Direct Termination Commission Contract
- Exhibit 2 – The Economic Impact of Free Conference Calling Services
- Exhibit 3 – Washington Post article dated August 8, 2010
- Exhibit 4 – “Gay Connection” and “Sweet Sensation” ads for chat lines on Verizon’s network
- Exhibit 5 – U.S. News & World Report article, dated December 1985, and PRNewswire press release, dated March 18, 1997
- Exhibit 6 – PacBell/AT&T brochure for “Pacific Bell Talkline”
- Exhibit 7 – Verizon Business Teleconferencing Service advertisement
- Exhibit 8 – Verizon Information Packets for 900/976/550 services and Overseas Audiotext Service
- Exhibit 9 – Verizon 900 Newsletter
- Exhibit 10 – Verizon’s 900 Contract
- Exhibit 11 – Articles describing Verizon’s commission and revenue-sharing arrangements
- Exhibit 12 – Illinois Commerce Commission decision
- Exhibit 13 – Excerpts from West Virginia PSC proceedings
- Exhibit 14 – Relevant portions of Tekstar tariff